

Mar 23, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AMOS ROGERS LITTLE, III, ESQ., AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF J. K., a Deceased Minor
Child, ERICA KELLEY, and JOSHUA
KELLEY,

Plaintiffs,

v.

GRANT COUNTY HOSPITAL
DISTRICT #1 d/b/a SAMARITAN
HEALTH CARE, BRIAN ROBERTSON,
M.D., KATHERINE MOLTHAN, R.N.,
SALLY SCHWAB, R.N., MICHAEL
LEEDOM, R.N., JODEE SHEETS, R.N.,
and NATALIYA MIKHAYLIK, R.N.,

Defendants.

NO. 2:18-cv-00292-SAB

**ORDER DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Before the Court is Defendant's Motion for summary Judgment ECF No. 61. A hearing on the motion was held on March 4, 2020. Plaintiff was represented by Alexander Wilschke. Defendants were represented by Erica Roberts and Jerome Aiken.

**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY
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1 In their Motion, Defendants asked the Court to grant summary judgment on
2 Plaintiffs' claim under the Emergency Medical Treatment Active Labor Act
3 ("EMTALA"). Defendants also asked the Court to dismiss Plaintiffs' negligence
4 claims for lack of subject matter jurisdiction. The parties stipulated to the dismissal
5 with prejudice of Plaintiffs' EMTALA claim, ECF No. 62, so the only remaining
6 issue is whether diversity jurisdiction exists for the Court to hear the remaining
7 state law claims.

8 **Background Facts**

9 This is a tragic case. Plaintiffs' four-month old daughter died from
10 cardiopulmonary arrest due to septic shock after numerous visits to the emergency
11 room over a seven-day period. Plaintiffs are bringing state law claims of
12 negligence and wrongful death against various health care providers who treated
13 their daughter.

14 Plaintiffs had only recently arrived in Washington before their daughter's
15 illness and death. Prior to that, Plaintiffs lived in Montana. Their daughter was
16 born in Montana. After her daughter's birth, Erica Kelley and her daughter lived in
17 California for a time, then returned to Montana, and then moved with Joshua
18 Kelley to Washington. They were staying at Mr. Kelley's uncle's and aunt's house.
19 Neither one was gainfully employed. Erica Kelley had worked two two-hour shifts
20 at a hotel prior to her daughter's death.

21 After their daughter died, the Kelleys stayed in Washington for 10 months,
22 then moved to Rathdrum, Idaho, where they stayed for a few months, and then
23 moved back to Montana. Erica and Joshua Kelley currently reside in Montana.

24 **Diversity Jurisdiction**

25 28 U.S.C. § 1332(a) provides that "district courts shall have original
26 jurisdiction of all civil actions where the matter in controversy exceeds the sum or
27 value of \$75,000, exclusive of interest and costs, and is between citizens of
28 different States." Plaintiffs have the burden of proof of establishing diversity

1 jurisdiction. *Lew v. Moss*, 797 F.2d 747, 752 (9th Cir. 1986). For purposes of
2 diversity jurisdiction, a person’s domicile is determined at the time the lawsuit is
3 filed. *Id.* at 750. The parties agree that, in this case, the determinative domicile is
4 the domicile of Erica Kelley. *See Miss. Band of Choctaw Indians v. Holyfield*, 490
5 U.S. 30, 48 (1989).

6 To be a citizen of a state, a natural person must first be a citizen of the
7 United States. *Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 828, 893
8 (1989). The natural person’s state citizenship is then determined by her state of
9 domicile, not her state of residence. *Kanter v. Warner-Lambert co.*, 265 F.3d 853,
10 857 (9th Cir. 2001). A person’s domicile is her permanent home, where she resides
11 with the intention to remain or to which she intends to return. *Id.* (citation omitted).
12 A person residing in a given state is not necessarily domiciled there, and thus is not
13 necessarily a citizen of that state. *Id.*; *see also Weible v. United States*, 244 F.2d
14 158, 163 (9th Cir. 1957) (“Residence is physical, whereas domicile is generally a
15 compound of physical presence plus an intention to make a certain definite place
16 one’s permanent abode, though, to be sure, domicile often hangs on the slender
17 thread of intent alone, as for instance where one is a wanderer over the earth.
18 Residence is not an immutable condition of domicile.”). Stated another way,
19 domicile requires both physical presence at a given location and an intent to remain
20 there indefinitely. *Kanter*, 265 F.3d at 857.

21 There are a number of factors courts use to determine a person’s state of
22 domicile, including: current residence, voting registration and voting practices,
23 location of personal and real property, location of brokerage and bank accounts,
24 location of spouse and family, membership in unions and other organizations,
25 place of employment or business, driver’s license and automobile registration, and
26 payment of taxes. None of these factors alone is controlling. *Lew*, 797 F.2d. at 750.
27 Courts evaluate domicile in terms of “objective facts,” and “statements of intent
28 are entitled to little weight when in conflict with facts.” *Id.* (quoting *Freeman v.*

1 *Northwest Acceptance Corp.*, 754 F.2d 553, 556 (5th Cir.1985) (internal quotation
2 marks omitted). “[T]he actual fact of residence and a real intention of remaining
3 there, as disclosed by [a party’s] entire course of conduct, are the controlling
4 factors in ascertaining his domicile.” *Freeman*, 754 F.2d at 555–56.

5 When the issue involves a change in domicile, additional principles of law
6 apply. First, a change of domicile requires more than physical presence at the new
7 location, it also requires evidence of an intent to remain there indefinitely. *Lew*,
8 797 F.2d at 750. Second, a person’s old domicile is not lost until a new one is
9 acquired. *Barber v. Varleta*, 199 F.2d 419, 423 (9th Cir.1952). Thus, there is a
10 presumption in favor of an established domicile over one newly acquired. *Id.*

11 Analysis

12 Here, it is undisputed that at the time of their daughter’s death, Plaintiffs
13 were living a transitory lifestyle. The evidence is insufficient to conclude that
14 Plaintiffs intended to make Washington their home indefinitely. At best, it appears
15 they wanted to give Washington a try to see if they could make a new life for
16 themselves. But, being willing to try a new location does not equate with intending
17 to stay in Washington permanently. In this case, it is undisputed that Montana was
18 Plaintiffs’ domicile prior to moving to Washington, notwithstanding that Ms.
19 Kelley and her daughter lived in California for a time prior to returning to
20 Montana. Relying on the presumption that Montana, the established domicile,
21 trumps Washington, the newly acquired domicile, the Court concludes that Ms.
22 Kelley’s domicile for purposes of diversity jurisdiction is Montana and therefore, it
23 has subject matter jurisdiction over the state law claims.

24 Accordingly, **IT IS HEREBY ORDERED:**

25 1. Defendants’ Motion for Summary Judgment, ECF No. 46, is
26 **DENIED**.

27 2. Plaintiffs’ Motion to Strike, ECF NO. 66, is **DENIED**, as moot.

28 3. Plaintiffs’ Motion to Expedite, ECF No. 67, is **DENIED**, as moot.

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4. Defendants' Motion to Strike, ECF No. 75, is **DENIED**, as moot.

IT IS SO ORDERED. The District Court Clerk is hereby directed to enter this Order and to provide copies to counsel.

DATED this 23rd day of March 2020.



Stanley A. Sestran

Stanley A. Bastian
United States District Judge